



Australian
Human Rights
Commission
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Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No.2]

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Australian Human Rights Commission
Submission to the Senate Standing Committee
on Legal and Constitutional Affairs

12 September 2008

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Introduction

1. The Australian Human Rights Commission ('the Commission') makes this submission to the Senate Standing Committee on Legal and Constitutional Affairs in its Inquiry into the *Independent Reviewer of Terrorism Laws Bill 2008 [No.2]* ('the Bill').

Summary

2. The Commission supports the enactment of the Bill and the introduction of an Independent Reviewer of Terrorism Laws.
3. The Bill should, however, be amended to require the Independent Reviewer to consider the human rights impacts of laws relating to terrorist acts and to strengthen the Independent Reviewers information gathering powers.

Recommendations

4. Recommendation 1

The Commission recommends that an Independent Reviewer of Terrorism Laws be appointed in order to provide an independent and comprehensive review mechanism for Australia's counter-terrorism law regime.

5. Recommendation 2

The Commission recommends that an Independent Reviewer should have a statutory obligation to consider the human rights impacts of laws relating to terrorist acts.

6. Recommendation 3

The Committee should consider strengthening the information gathering powers of the Independent Reviewer by:

- a. Giving the Independent Reviewer the power to examine persons on oath or affirmation; and
- b. Introducing penalties for failing to produce information or documents required by the Independent Reviewer.

Australia needs an independent reviewer of terrorism laws

7. The Commission has consistently called for the establishment of an Independent Reviewer.¹
8. Regular, independent review of counter-terrorism legislation is vital because of:
 - a. The potential of some counter-terrorism laws to disproportionately infringe fundamental rights; and
 - b. The lack of adequate judicial review mechanisms in relation to various aspects of the terrorism regime; and
 - c. The limited ability - particularly in the absence of an Australian Charter of Rights - for a person subject to counter-terrorism laws to test the compatibility of those laws with fundamental human rights.
9. Current mechanisms for the review of counter-terrorism laws are ad hoc and inadequate. While aspects of counter-terrorism laws have been subject to independent review, other parts have not. For example, under the *National Security Information (Criminal and Civil Proceeding) Act 2004* (Cth) (NSIA) evidence in terrorism trials can be admitted in a closed hearing from which the defendant may be excluded, at least for part of the evidence. Despite the potentially serious implications of the provisions of the NSIA for the right to a fair trial, there is no mechanism to review the operation of this legislation.
10. While the Council of Australian Governments ('COAG') will review the operation of the *Anti-Terrorism Act 2005* (Cth) in 2010, there is a need for a more regular and comprehensive mechanism of review which is independent from Government.²
11. In April 2006, the report of the Security Legislation Review Committee ('SLRC') recommended that the Government establish a legislative-based timetable for continuing review of the security legislation, by an independent body, such as the SLRC, to take place within the next three years.³

¹ See Human Rights and Equal Opportunity Commission, Submission to the Security Legislation Review Committee, January 2006; Human Rights and Equal Opportunity Commission, Submission to the Clarke Inquiry on Dr Haneef, May 2008. Both submissions are available at <http://www.humanrights.gov.au/legal/>.

² It is noted that the SLRC states that if an independent reviewer had been appointed the review to be commissioned by COAG in late 2010 could be expanded in its scope to include all of Part 5.3 of the Criminal Code. SLRC, *Report of the Security Legislation Review Committee* (2006), 201 [18.3].

³ Security Legislation Review Committee ('SLRC'), *Report of the Security Legislation Review Committee* (2006), 201 [18.2].

12. The SLRC report noted that in the United Kingdom an independent reviewer has the mandate to review the implementation of terrorism laws and report annually to Parliament.⁴

13. In December 2006, the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') unanimously recommended the appointment of an Independent Reviewer of terrorism law in Australia. The PJCIS said:

The new terrorism law regime carries heavy penalties and introduces significant changes to the traditional criminal justice model. While it is the role of the courts to interpret and apply the existing law it is Parliament that is responsible for the policy. To date, post enactment review has been sporadic and fragmented with a focus on specific pieces of legislation rather than the terrorism law regime as a whole. This has limited the opportunity for comprehensive evaluation and highlights the need for an integrated approach to ensure ongoing monitoring and refinement of the law, where necessary.⁵

14. The PJCIS also found that 'one of the damaging consequences of the terrorist bombing attacks in the US, the UK, Europe and Indonesia has been a rise in prejudicial feelings towards Arab and Muslim Australia'.⁶ It also expressed concern about 'reports of increased alienation attributed to new anti-terrorist measures, which are seen as targeting Muslims and contributing to a climate of suspicion'.⁷ An Independent Reviewer could help restore public confidence in counter-terrorism laws and provide guidance to Parliament on how to ensure that counter-terrorism laws do not adversely impact on human rights.

15. The Commission therefore unanimously recommended that an Independent Reviewer of Terrorism Laws be appointed in order to provide an independent and comprehensive review mechanism for Australia's counter-terrorism law regime. **[Recommendation 1]**

⁴ Section 126 of the *Terrorism Act 2000* (UK); ss 14(3) of the *Prevention of Terrorism Act 2005*. Lord Carlile of Berriew, QC, is the Independent reviewer appointed by the Secretary of State under the *Prevention of Terrorism Act 2005* (UK) annually to review the operation of that Act and prepare a report to Parliament pursuant to the *Terrorism Act 2000*. Lord Carlile's reports are available at <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/checks-on-laws2/>; see also Security Legislation Review Committee ('SLRC'), *Report of the Security Legislation Review Committee* (2006), [18.5].

⁵ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-terrorism Legislation*, December 2006, 21.

⁶ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, Canberra, [3.3] citing the Human Rights and Equal Opportunity Commission, *Ismaξ–Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* ('the *Ismaξ*Report'), 2004.

⁷ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, Canberra, [3.3], [3.5].

Proposed amendments to the Bill

The Independent Reviewer should be specifically required to consider the human rights impacts of laws relating to terrorist acts

16. Cl 8 of the Bill gives the Independent Reviewer the following functions:

...at the request of the responsible Minister; or of the Parliamentary Joint Committee on Intelligence and Security; or of the Independent Reviewer's own motion, to review the operation, effectiveness and implications of laws relating to terrorist acts. The Independent Reviewer shall be free to determine priorities as he or sees fit.

17. The Bill does not specifically require the Independent Reviewer to consider whether laws comply with Australia's human rights obligations under international human rights conventions which Australia has ratified⁸ or the human rights impacts of the operation of counter-terrorism laws.
18. The Commission supports giving an Independent Reviewer a broad mandate. The Independent Reviewer should not be restricted to reviewing one aspect of the Australia's counter-terrorism laws but should have the ability to consider how Australia's counter-terrorism laws are working as a whole. This is because sometimes different counter-terrorism powers interact to impact on people's rights. For example, a person who is the subject of an application for a control order may not be informed of particular evidence in the case against him because it is information that is considered likely to prejudice national security within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.
19. While the Commission supports giving the Independent Reviewer a broad mandate, the Commission submits that it is appropriate to require the Independent Reviewer to consider the human rights impacts of laws relating to terrorist acts. Such a requirement will ensure the Independent Reviewer provides guidance to Government on ensuring counter-terrorism laws comply with human rights.
20. A requirement that the Independent Reviewer consider the human rights impacts of laws relating to terrorist acts is particularly important in the absence of a statutory federal charter of human rights. Currently, there is no requirement on parliament to expressly consider the human rights compatibility of counter-terrorism laws.
21. The Commission is concerned that terrorism laws in Australia have often been enacted in haste and without adequate assessment of whether they comply

⁸ See, in particular, *The International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* opened for signature 12 October 1984, 1465 UNTS 85 (entered into force 16 June 1987).

with Australia's international human rights obligations. Significantly, the SLRC report expressed concern that government agencies sometimes '... passed over the invasive effect of particular legislation on human rights, and said little about particular steps that might have been taken by their agencies to alleviate such effects'.⁹

22. The Commission therefore recommends that the Independent Reviewer should specifically be required to examine:
- a. The operation, effectiveness and implications of laws relating to terrorist acts; and
 - b. The human rights impacts of laws relating to terrorist acts.
- [Recommendation 2]**

Failure to comply with the Independent Reviewer's information gathering powers should attract penalties

23. The Commission considers the Independent Reviewer's information gathering powers under cl 10 of the Bill could be strengthened. Under cl 10(1) and cl 10(5) of the Bill the Independent Reviewer may, by written notice, require a person to produce documents or attend before the Independent Reviewer and answer questions.¹⁰ However, no penalties attach to the failure to comply with a written notice from the Independent Reviewer.
24. The Committee should consider strengthening the information gathering powers of the Independent Reviewer by:
- a. Giving the Independent Reviewer the power to examine persons on oath or affirmation;¹¹
 - b. Introducing penalties for failing to produce information or documents required by the Independent Reviewer.¹²
- [Recommendation 3]**

⁹ SLRC, *Report of the Security Legislation Review Committee* (2006) [5.2].

¹⁰ It is noted cl 10 (6) of the Bill provides: 'A person is not liable to any penalty under the provisions of any other enactment by reason of his or her giving the information to the Independent Reviewer or producing the document to the Independent Reviewer'.

¹¹ See, for example, the information gathering powers in ss 21 and 22 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)

¹² See, for example, the penalty provisions for failing to give information or documents under s 23 the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).